

DOCUMENT RESUME

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[Payment of Judgment Calling for Government Contribution to Civil Service Retirement Fund]. B-191321. November 30, 1978. 6 pp.

Decision re: Katsura Fukui; by Robert F. Keller, Deputy Comptroller General.

Contact: Office of the General Counsel: Personnel Law Matters II.

Organization Concerned: Department of Justice: Civil Div.; Civil Service Commission.

Authority: (P.L. 95-26; 91 Stat. 61; 91 Stat. 96; 31 U.S.C. 724a). Back Pay Act of 1966 (5 U.S.C. 5596). Veterans Preference Act (5 U.S.C. 7701). Civil Rights Act of 1964, as amended, title VII (42 U.S.C. 2000e). P.L. 91-93. P.L. 92-415. P.L. 88-519. 83 Stat. 136. 86 Stat. 652. 78 Stat. 699. 28 U.S.C. 1491. 28 U.S.C. 2414. 28 U.S.C. 2517. 28 U.S.C. 2672. 28 U.S.C. 2677. 5 U.S.C. 8334. 5 U.S.C. 8348. B-124720 (1961). S. Rept. 91-339.

Consideration was given to whether a certain portion of a judgment providing for backpay could be certified for payment. The Government's contribution to the Civil Service Retirement Fund, called for in the judgment, may be paid as follows: from the Judgment Fund created by 31 U.S.C. 724a where the judgment specifically provided for payment of the Government's contribution; or from agency appropriations where the judgment called for payment of backpay but did not specifically provide for payment of the Government's contribution. (HTW)

DECISION



D. F. Sullivan
**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D.C. 20548

8464

FILE: B-191321

DATE: November 30, 1978

MATTER OF: Dr. Katsura Fukui - Payment of Judgment

- DIGEST:**
1. Employee recovered judgment in U.S. District Court providing for backpay and specifically calling for payment of Government's contribution to Civil Service Retirement Fund. Where judgment specifically provides for payment of Government's contribution to Civil Service Retirement Fund or similar funds, that contribution may be paid from Judgment Fund created by 31 U.S.C. § 724a.
 2. Where judgment entered in favor of employee calls for payment of backpay, but does not specifically mention or provide for payment of Government's contribution to Civil Service Retirement Fund, that contribution may be paid from agency appropriations. B-124720, May 15, 1961, is overruled.

This matter arises from a request for the certification of a judgment for payment from the Judgment Fund created by 31 U.S.C. § 724a.

By letter of December 13, 1977, from Ms. Barbara Allen Babcock, Assistant Attorney General, Civil Division, Department of Justice, the "Stipulation of Compromise and Dismissal," in Katsura Fukui v. Secretary of the Air Force, et al., Civil Action No. 75-5208-G, United States District Court for the District of Massachusetts, was submitted to this Office for certification and payment. Under the terms of the Stipulation, plaintiff Fukui was to be paid the net amount of \$26,691, and \$2,009 was to be deposited on plaintiff's behalf as his contribution to the Civil Service Retirement Fund. Additionally, \$2,009 was to be deposited in the Civil Service Retirement Fund as the Government's or employer's contribution.

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During the review of the stipulation prior to certification, our decision B-127420, May 15, 1961, was considered. In that decision we held that no appropriation was available to pay the Government's contribution to the Civil Service Retirement Fund where such contribution became due incident to backpay awarded in a Court of Claims Judgment. Because we believed that it was desirable to reexamine that decision, we certified that part of the Stipulation calling for the payment to plaintiff Fukui and for the payment of his contribution to the Civil Service Retirement Fund. This decision considers whether or not the remainder of the Stipulation may be certified for payment.

The act of July 27, 1956, as amended by chapter XIV of Public Law 95-26, May 4, 1977, 91 Stat. 61, 96, 31 U.S.C. § 724a, provides, in pertinent part that:

"There are appropriated, out of any money in the Treasury not otherwise appropriated, such sums as may be necessary for the payment, not otherwise provided for, as certified by the Comptroller General, of final judgments, awards, and compromise settlements, which are payable in accordance with the terms of sections 2414, 2517, 2672, 2677 of Title 28, together with such interest and costs as may be specified in such judgments or otherwise authorized by law * * *."

There is no question that the amounts owed to plaintiff Fukui under the terms of the Stipulation were payable from the above appropriation. These were in fact paid from it, including Mr. Fukui's contribution to the Civil Service Retirement Fund.

A review of B-124720, May 15, 1961, shows that the judgment involved there was silent regarding payment of the Government's contribution. That is not the case here, because the Stipulation specifically calls for the payment of the Government's contribution. We believe that that specific provision distinguishes the instant case from our prior holding. Since there is no specific restriction in 31 U.S.C. § 724a barring the payment, when a judgment or compromise generally qualifies for payment under 31 U.S.C. § 724a, if it provides for payment of the Government's contribution to the Civil Service Retirement Fund, or any similar fund, that payment may be made from the Judgment Fund created by that section.

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This holding also satisfies the literal requirements of 5 U.S.C. § 8334(a)(1) (1976) that the Government's contribution be paid "from the appropriation or fund used to pay the employee" and it is not in conflict with the theory that the Judgment Fund may be used only for payments to or on behalf of a judgment creditor.

Although the specific issue raised in the instant case is thus settled, we believe that the basic holding of B-124720, May 15, 1961, must be reexamined. The specific provision calling for payments into the Civil Service Retirement Fund, 5 U.S.C. § 8334 (1973), provides, in pertinent part, that:

"(a)(1) The employing agency shall deduct and withhold 7 percent of the basic pay of an employee, 7-1/2 percent of the basic pay of a Congressional employee, a law enforcement officer, and a firefighter, and 8 percent of the basic pay of a Member. An equal amount shall be contributed from the appropriation or fund used to pay the employee or, in the case of an elected official, from an appropriation or fund available for payment of other salaries of the same office or establishment. * * *"

Under normal circumstances, an employee's salary and the Government's contribution to the Civil Service Retirement Fund are paid at the same time, and there are no obstacles to making both payments from the same "appropriation or fund." The problem arises when an employee receives backpay either because he is reinstated following a termination or his salary is retroactively adjusted.

Most retroactive payments are made under one of the following statutes, the Back Pay Act of 1966, 5 U.S.C. § 5596 (1976); the Veterans Preference Act, 5 U.S.C. § 7701 (1976); or Title VII of the Civil Rights Act of 1964 as amended, 42 U.S.C. § 2000e-16 (Supp. II, 1972). Under all three of these Acts, when an employee is restored or his salary is adjusted, the service of the employee is valid service, at the adjusted pay rate, for all purposes. Once the employee's contribution to the Civil Service Retirement Fund is made, the Government's obligation to pay an annuity, if the employee eventually otherwise qualifies, arises. That obligation is not impaired or diminished because the Government fails to make

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its equal contribution to the Retirement Fund. The only consequence of the failure of the Government to contribute is that unfunded liability of the Civil Service Retirement Fund is increased.

In B-124720, May 15, 1961, with the judgment silent as to payment of the Government's contribution, we held that it could not be paid from the agency's regular appropriations because appropriations are not available for the payment of judgments unless specifically authorized, and because that appropriation was not the same one that was used to pay the employee's salary. We no longer believe that either reason is valid.

Since the judgment did not provide for the payment of the Government's contribution, it is not truly part of the judgment. The Government's obligation to pay its contribution to the Civil Service Retirement Fund does not arise from the judgment, but from the fact that the employee receives full retirement credit for the service effected by the judgment. Therefore, since the payment is not part of the judgment, the rationale that regular appropriations are not available for the payment of judgments does not apply.

Additionally, we no longer believe that the language of 5 U.S.C. § 8334 requiring that the Government's contribution come from the appropriation or fund used to pay the employee's salary must be read that restrictively. If a payment of backpay is made following an administrative finding or settlement under any of the remedial provisions cited above, then the employee's salary and the Government's contribution will actually be paid from the same appropriation. Although that would not be literally true if the retroactive salary payment was paid from the Judgment Fund appropriation created by 31 U.S.C. § 724a, and the Government's contribution was paid from the agency's appropriation, we believe that it would comport with the expressed intent of the Congress. In Public Law 91-93, October 20, 1969, 83 Stat. 136, the Congress made it clear that increases in the unfunded liability of the Civil Service Retirement Fund were not to be permitted. That Act added subsections (f) and (g) to 5 U.S.C. § 8348. Subsection (f) provides that any statute authorizing new or more liberal annuity payments, extension of retirement coverage to new groups, or increases in the pay used to compute retirement benefits would be deemed to authorize appropriations to the Civil Service Retirement Fund to fund the new liability thereby created. Subsection (g) authorizes the Secretary of the Treasury to transfer money from the Treasury to the Retirement Fund at the end of each

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fiscal year to pay the interest on the unfunded liability as well as the cost of military service credit. Taken together, these provisions express a congressional mandate limiting further increases in the unfunded liability of the Retirement Fund. See Senate Report 91-339, 91st Cong., 1st Sess., August 1, 1969. We believe that the above materials provide a more than sufficient basis for revising our interpretation of 5 U.S.C. § 8334(a)(1). In arriving at the above conclusion, we did not overlook the fact that Public Law 91-93 did not require a change from a static normal cost to a dynamic cost projection.

We also note that when B-124720, May 15, 1961, was decided, neither the Court of Claims nor the United States district courts could render complete relief to a separated employee. Under 28 U.S.C. § 1491 as it was then written, the Court of Claims could only award money judgments, it could not order that an employee be restored. The opposite was true for the district courts, they could order employees restored but could not award money judgments for backpay. The Court of Claims which entered the judgment involved in B-124720, May 15, 1961, could do nothing but enter a money judgment in favor of the separated employee, they could not order that he be restored to duty. This is no longer the case. Now the Court of Claims may order that an employee be reinstated, and the district courts may award backpay, up to its jurisdictional limit. See section 1 of Public Law 92-415, August 29, 1972, 86 Stat. 652, and Public Law 98-519, August 30, 1984, 98 Stat. 899.

In the circumstances we now believe that under the above rule, an agency appropriation generally available for salaries and expenses may be used to pay the Government's contribution to the Civil Service Retirement Fund as part of retroactive relief given to an employee by the courts. The appropriation to which the payment should be charged should be the appropriation that would have been charged had the agency made the payment when it was originally due. If, because of the amount of time involved in the retroactive relief, more than one appropriation is involved, the charge should be apportioned among all of the appropriations covered.

In summary, B-124720, May 15, 1961, is overruled and will no longer be followed. If an otherwise qualifying judgment awards an employee backpay and specifically provides for the payment of the Government's contribution to the Civil Service Retirement Fund.

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or similar funds, then that contribution must be paid from the Judgment Fund created by 31 U.S.C. § 724a. If the judgment is silent as to payment of the Government's contribution, then that contribution shall be paid from the agency's appropriations.

Deputy


Comptroller General
of the United States